LONE STAR STEEL CO.

IBLA 83-377 Decided March 22, 1984,

Appeal from decision of New Mexico State Office, Bureau of Land Management, imposing rental charges for haul road right-of-way NM 29739 (OK).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Generally -- Rights-of-Way: Act of October 21, 1976 (FLPMA)

   Where BLM grants a right-of-way for a haul road under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976), subject to a future appraisal, BLM may subsequently appraise the land included in the right-of-way, and the rental charges imposed from the date of the right-of-way grant will not be considered retroactive.

2. Appraisals -- Rights-of-Way: Appraisals

   An appraisal of a right-of-way for a haul road, granted pursuant to sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1976), will be upheld on appeal if no error is shown in the appraisal method used by BLM and the appellant fails to show by convincing evidence that the annual rental charge is excessive.

3. Administrative Authority: Laches -- Estoppel -- Laches
   The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

APPEARANCES: William A. Osborn, Esq., Operations Counsel, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Lone Star Steel Company (Lone Star) appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated January 25,

1983, requiring rental of $490 per year for haul road right-of-way NM 29739 (OK). The decision, in essence, rejected appellant's protest of the amount of rental established in BLM's letter of December 29, 1982.

Lone Star was originally granted temporary tramroad permit NM 14682 (OK) across secs. 14 and 15, T. 8 N., R. 22 E., Indian meridian. The tramroad permit was granted on December 6, 1971, pursuant to the Act of January 21, 1895, ch. 37, § 1, 28 Stat. 635 (repealed 1976, formerly codified at 43 U.S.C. § 956). This permit expired December 7, 1976. The statutory authority for a tramroad right-of-way was repealed October 21, 1976. Federal Land Policy and Management Act of 1976 (FLPMA), § 706(a), P.L. 94-579, 90 Stat. 2743, 2793. Thereafter, Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1976), became the statutory authority for granting rights-of-way across the public lands. See Donald R. Clark, 56 IBLA 167 (1981).

A request for renewal of the right-of-way was filed on February 2, 1977. On June 4, 1981, BLM granted appellant a right-of-way pursuant to section 501 FLPMA, 43 U.S.C. § 1761 (1976), for an existing coal haul road. The term of grant was from December 7, 1976, through December 7, 1986. The right-of-way is 1.587 miles long, 100 feet wide, and occupies approximately 19 acres. The right-of-way grant identified the applicable regulation as 43 CFR Part 2800. Regarding the rental, item 9 of the right-of-way grant specified the following: "The right-of-way herein granted shall be subject to the express covenant that if other administrative costs and/or rentals are due, as indicated by an appraisal, they shall be paid upon request."

In the appraisal dated December 22, 1982, the appraiser stated that he investigated several sales in the vicinity of the subject property. Based upon these sales it was his opinion that the fair market value of the property as of December 1976 was $250 per acre. The rental was computed as follows:

> 19.23 acres at $250 per acre = $4,807 say $4,800 $4,800 at 10.25 percent = $492.00 say $490.00 annual rental 5-year lump sum rental would be $2,025

By letter dated December 29, 1982, BLM informed appellant of the rental charge of $490 for 1 year or $2,025 for 5 years. BLM gave appellant the opportunity to discuss questions concerning the charges with BLM, or to file written objections based on evidence that the rental charge did not represent current fair market value for the rights conveyed. BLM also stated that appellant could request a hearing.

On January 20, 1983, appellant responded by stating that it was unaware of any contractual commitment to pay rentals for the right-of-way. Appellant requested that BLM explain the legal basis for the charges.

In its letter to appellant dated January 25, 1983, BLM explained that 43 CFR 2803.1-1 requires reimbursement of costs for application processing and administration of right-of-way grants, while 43 CFR 2803.1-2 requires the holder of right-of-way grants to pay annually, in advance, the fair market rental value of the right-of-way.

BLM reaffirmed the rental rate set in the notice of December 29, 1982, and required that the rental must be paid within 30 days of receipt of the letter. BLM also informed appellant of its right to appeal. Lone Star appealed BLM's decision and requested information from BLM relating to the appraisal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976).

In its statement of reasons, appellant contends that BLM has failed to explain or justify the rental charges. Appellant refers to 43 CFR 2803.1-2 which provides that rentals shall be assessed and payable on an annual basis unless the rental is less than $100 per year. Appellant contends that BLM violated this regulation by waiting 6 years to assess retroactive rentals. Appellant argues that BLM also violated 43 CFR 2803.1-2(d) by failing to give reasonable notice prior to imposing or adjusting rentals.

Appellant asserts that BLM's appraisal does not represent the fair market value for the locale in which the right-of-way is situated. Appellant asserts that it cannot make specific criticism of BLM's determination because BLM has not provided appellant with information concerning the method of valuation which BLM used in its appraisal.

Appellant asserts that BLM's tardy assessment hinders accurate determination of fair market value at past points in time and denies appellant the ability to contest the fairness of the appraisal. Appellant requests that it be assessed no more than $100 per year. Alternatively, appellant requests that the case be remanded to BLM with instructions to justify their assessment and to grant appellant a hearing concerning any matter still in dispute.

On April 22, 1983, BLM filed "back-up material" used in assessing fair market value of appellant's right-of-way. BLM stated that it sent a copy of the material to appellant pursuant to its FOIA request.

In appraising the parcel, BLM used the "comparable sales approach" set forth in Uniform Appraisal Standards for Federal Land Acquisitions (1973), established by the Interagency Land Acquisition Conference and adopted by the Department. 603 DM 1.3.

The following information was obtained from the "back-up material." In July 1982, the appraiser confirmed, field examined, and analyzed six private sales in the vicinity. The sales ranged in size from 20 to 158 acres and all sold for between $350 and $524 per acre. The sales were rated on the basis of their comparability to the subject land in terms of time, location, access, physical characteristics, and other factors. The sales were all considered superior to the right-of-way parcel.

The appraiser took into consideration the approximate 5-year difference between the time of the private sales and the evaluation date for the right-of-way rental (December 7, 1976) as well as other differences, and adjusted the appraisal downward significantly. Giving consideration to all pertinent factors, the appraiser determined the fair market value of the land in the right-of-way to be $250 per acre as of December 7, 1976. This value is further confirmed by two other contemporaneous transactions dated January 1977 and October 1978. The first sale, occurring about 6 weeks after the right-of-way appraisal date, involved a parcel located about 13 miles southwest of

the subject. After the value of improvement was deducted, the land value was determined to be $400 per acre. Adjusting the sale significantly for location, size, and land character differences, this sale would support a value of about $250 per acre for the subject. The 1978 sale involved a parcel which sold for $500 per acre. This parcel, rural in character, is located 12 miles south of the subject, further from a small community center than the subject. This sale further supports a value of $250 per acre for the subject as of December 7, 1976.

[1] Appellant contends that BLM imposed retroactive rentals in violation of 43 CFR 2803.1-2 and 43 CFR 2803.1-2(d). We disagree. Appellant was on notice at the time the right-of-way was granted as to the procedure being used by BLM for imposing the rental charges. Item 9 of the right-of-way grant provided: "The right-of-way herein granted shall be subject to the express covenant that if other administrative costs and/or rentals are due, as indicated by an appraisal, they shall be paid upon request."

We note that the language of section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), clearly requires annual advance payments after the fair market value has been determined by BLM. Thus, a right-of-way applicant obtains an advantage, in that use of the right-of-way does not have to be deferred pending BLM's accomplishment of an appraisal. We do not regard this as a prohibited imposition of a retroactive rental, and fail to see that appellant has been prejudiced. See Mountain States Telephone and Telegraph Co., 79 IBLA 5 (1984). 1/

[2] Appellant asserts that the BLM appraisal does not represent fair market value for the area in which the right-of-way is situated. Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), provides, in relevant part, that the holder of the right-of-way "shall pay annually in advance the fair market value thereof as determined by the Secretary granting * * * such right-of-way." In its appraisal, BLM established the fair market value of the land in the right-of-way at $250 per acre. As a general rule, an appraisal will be affirmed if there is no error in the appraisal method used by BLM or the appellant fails to show by convincing evidence that the charge is excessive. Donald R. Clark, 70 IBLA 39 (1983); Meyring Livestock Co., 69 IBLA 110 (1982). Ordinarily, in the absence of compelling evidence that a BLM appraisal is erroneous, such an appraisal may be rebutted only by another appraisal. Meyring Livestock Co., supra at 111.

Although it is true as appellant alleges that at the time of BLM's decision the case record was lacking in documentation to support the appraisal, the background data upon which the appraisal was based has now been provided. The supplemental information which BLM filed with the Board on April 22, 1983, contained the data used by the BLM appraiser in arriving at its rental charge determination. BLM stated on a cover memorandum accompanying the material that a copy was sent to appellant pursuant to its request. Appellant has not

1/ Appellant's former tramroad permit expired after repeal of the statutory authority therefor. At that time, Title V of FLPMA requiring payment of fair market value was the only authority under which appellant could continue to utilize its former right-of-way. See 43 U.S.C. § 1770(a) (1976).

responded to the evidence offered in support of the appraisal. We find that appellant has failed to offer any evidence to show that BLM's appraisal method is erroneous or that the annual rental charge for its right-of-way is excessive. Accordingly, we must uphold BLM's assessment of an annual rental charge in the amount of $490.

Appellant asserts that BLM's tardy appraisal hinders accurate determination of fair market value, but fails to offer evidence to substantiate this. Moreover, the data submitted by BLM shows that the appraiser adjusted the appraisal downward significantly to compensate for the time difference between the date of right-of-way grant and the sale comparables. Further, one of the sales on which the appraisal was based was contemporaneous with the right-of-way grant.

[3] The clear mandate of FLPMA, pursuant to which appellant's use of the right-of-way was authorized, requires that the holder pay the fair market value thereof. 43 U.S.C. § 1764(g) (1976). The authority of the United States to enforce a public right or to protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties. Amoco Production Co., 78 IBLA 93 (1983); Alyson A. Allison, 72 IBLA 333 (1983); Warren L. Jacobs, 71 IBLA 385 (1983).

Appellant requests a hearing to resolve any matter in dispute. A hearing is necessary only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. Kernco Drilling Co., 71 IBLA 53 (1983). Appellant has tendered no evidence to rebut the appraisal and supporting documentation in the record. We do not find an issue of fact in dispute in this case. In the absence of such an issue, no hearing is required. Kernco Drilling Co., supra; see also United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971).

Therefore, pursuant to authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Gail M. Frazier
Administrative Judge